



This document is scheduled to be published in the Federal Register on 05/01/2012 and available online at <http://federalregister.gov/a/2012-10178>, and on [FDsys.gov](http://FDsys.gov)

## **DEPARTMENT OF THE INTERIOR**

### **Fish and Wildlife Service**

#### **50 CFR Parts 17 and 424**

## **DEPARTMENT OF COMMERCE**

### **National Oceanic and Atmospheric Administration**

#### **50 CFR Parts 226 and 424**

**[Docket Nos. FWS-R9-ES-2010-0073; NOAA-110131071-2013-02; MO-92210-0-0009-B4]**

**RIN 1018 – AX44; 0648 – BA77**

### **Endangered and Threatened Wildlife and Plants; Revised Implementing Regulations for Requirements to Publish Textual Descriptions of Boundaries of Critical Habitat**

**AGENCY:** United States Fish and Wildlife Service (FWS), Interior; National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA),

Commerce.

**ACTION:** Final rule.

**SUMMARY:** We (FWS and NMFS; also jointly referred to as the Services) are revising regulations related to publishing textual descriptions of proposed and final critical habitat boundaries in the **Federal Register** for codification in the Code of Federal Regulations.

In the interest of making the process of designating critical habitat more user-friendly for affected parties, the public as a whole, and the Services, as well as more efficient and cost effective, we are going to maintain the publication of maps of proposed and final critical habitat designations, but are making optional the inclusion of any textual description of the boundaries of the designation in the **Federal Register** for codification in the Code of Federal Regulations. The boundaries of critical habitat as mapped or otherwise described in the Regulation Promulgation section of a rulemaking that is published in the **Federal Register** will be the official delineation of the designation. The coordinates and/or plot points from which the maps are generated will be included in the administrative record for the designation, and will be available to the public on the Internet site of the Service promulgating the designation, at [www.regulations.gov](http://www.regulations.gov), and at the lead field office of the Service responsible for the designation. We will also continue our practice of providing the public with additional tools and supporting information, such as interactive maps and additional descriptions, on the Internet site of the Service promulgating the designation and at the lead field office responsible for the designation (and we may also include such information in the preamble and/or at [www.regulations.gov](http://www.regulations.gov)) to assist the public in

evaluating the coverage of the critical habitat designation. We have undertaken this effort as part of the Services' response to Executive Order 13563 (Jan. 18, 2011) directing Federal agencies to review their existing regulations and, inter alia, to modify or streamline them in accordance with what they learned.

**DATES:** This rule becomes effective [INSERT DATE 30 DAYS AFTER DATE OF FEDERAL REGISTER PUBLICATION].

**ADDRESSES:** This final rule is available on the Internet at <http://www.regulations.gov>. Supporting documentation used in the preparation of this rule will be available for public inspection, by appointment, during normal business hours at: U.S. Fish and Wildlife Service, Division of Conservation and Classification, 4401 N. Fairfax Drive, Suite 420; Arlington, VA 22203, telephone 703/358-2171; facsimile 703/358-1735 and National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910, telephone 301-713-1401; facsimile 301-713-0376.

**FOR FURTHER INFORMATION CONTACT:** Nicole Alt, U.S. Fish and Wildlife Service, Division of Conservation and Classification, 4401 N. Fairfax Drive, Suite 420; Arlington, VA 22203, telephone 703/358-2171; facsimile 703/358-1735 or Marta Nammack, National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910, telephone 301-427-8469; facsimile 301-713-0376. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

## **SUPPLEMENTARY INFORMATION:**

### **Background**

Before a plant or animal species can receive the protection provided by the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) (Act), it must first be added to the Federal lists of threatened and endangered wildlife and plants. The List of Endangered and Threatened Wildlife (found in title 50 of the Code of Federal Regulations (CFR) in § 17.11) and the List of Endangered and Threatened Plants (found in 50 CFR 17.12) contain the names of all organisms that have been determined by the Services to qualify as “endangered species” or “threatened species.” After a species is listed as endangered or threatened under the Act, the Service that listed the species designates as "critical habitat," to the maximum extent prudent and determinable, specific areas essential for the conservation of the species.

Under section 4(b)(5)(A) of the Act, the Services are required, when designating or revising critical habitat for species listed under the Act, to publish the complete text of the regulation in the Regulation Promulgation section of a rulemaking published in the **Federal Register**. The existing implementing regulations found in 50 CFR sections 17.94(b), 226.101, 424.12(c), 424.16(b) and (c)(1)(ii), and 424.18(a) have interpreted this requirement to comprise publication of both maps and textual descriptions of the

boundaries of such habitat. We have found over time that textual descriptions of critical habitat boundaries are often difficult to interpret and understand, and do not provide clarity regarding the areas being designated. Publishing these textual descriptions is also inefficient and costly. Below we discuss our current requirements and their limitations, and the regulation changes we are promulgating to address these issues.

NMFS' current practice is to publish maps in the **Federal Register** along with a textual description of the boundaries of the areas being designated as critical habitat in both their proposed and final rules. FWS publishes only the maps in the proposed critical habitat rule and then publishes the maps along with a textual description of the boundaries in the final critical habitat rule. Historically we described the boundaries following a variety of methods, including Public Land Survey System designations (which specify township, range, and section; sometimes referred to as the "rectangular survey system") and metes-and-bounds (a system of describing a parcel of land using the physical features of local geography, along with directions and distances, to define the boundaries). However, as GIS and specific geographic-based data have become more available, we have been using predominantly the Universal Transverse Mercator (UTM) coordinate system (a grid-based system employing a series of 60 zones to specify locations on the surface of the Earth) and latitude–longitude. We adopted these practices because our current regulations at 50 CFR 424.12(c) state, "Each critical habitat will be defined by specific limits using reference points and lines as found on standard topographic maps of the area." Unfortunately, these descriptions are often difficult to interpret and understand, and do not provide clarity regarding which areas are being

designated as critical habitat. Therefore, in addition to the maps and textual descriptions published in the **Federal Register**, over the last several years we have provided the public with interactive maps and additional descriptions, on the Services' Internet sites and at the lead field office responsible for the designation. References to these Internet sites are cited throughout the proposed (NMFS only) and final (NMFS and FWS) rules and in our outreach materials for the specific action. In addition, we have provided maps and GIS coverages (data layers) to affected Federal agencies, states, counties, jurisdictions, and interested parties for use in their computer databases and to make available to their constituencies. Our understanding that the public has referred to these latter materials in lieu of the detailed coordinates and other similar textual descriptions published in the **Federal Register** and codified in the Code of Federal Regulations reinforces our view that these textual descriptions are of limited utility in informing the public as to which areas are designated as critical habitat.

Given that the textual descriptions are of limited utility, we are revising the implementing regulations contained within 50 CFR 17.94(b), 226.101, 424.12(c), 424.16(b) and (c)(1)(ii), and 424.18(a), to eliminate the requirement to publish textual descriptions of proposed (NMFS only) and final (NMFS and FWS) critical habitat boundaries in the **Federal Register** and reprinting in the CFR, and instead provide that the map(s), as clarified or refined by any textual language within the rule, constitutes the definition of the boundaries of a critical habitat. Each critical habitat area will be shown on a map, with more-detailed information discussed in the preamble of the rulemaking documents published in the **Federal Register**. The map published in the CFR will be

generated from the coordinates and/or plot points corresponding to the location of the boundaries. These coordinates and/or plot points will be included in the administrative record for the designation, and will be available to the public on the Internet site of the Service promulgating the designation, at [www.regulations.gov](http://www.regulations.gov), and at the lead field office of the Service responsible for the designation. In addition, if the Service responsible for the designation concludes that additional tools or supporting information would be appropriate and would help the public understand the official boundary map, it will make the additional tools and supporting information available on our Internet sites and at the lead field office of the Service that is responsible for the critical habitat designation (and may also include it in the preamble and/or at [www.regulations.gov](http://www.regulations.gov)). The maps and brief textual descriptions that we plan to publish in the **Federal Register** after we finalize this rule will be sufficient to inform the public of the boundaries of a particular critical habitat designation, and thus constitutes sufficient notice to the public. It is not necessary—or generally even helpful—for the public to have UTM or latitude–longitude coordinates in order to know where critical habitat is located. We believe these changes will be for the public good and make the process more user-friendly, without compromising the public’s understanding of the overall process.

In addition to making the process more accessible to the public, eliminating the need to publish detailed textual descriptions in the **Federal Register** and annually in the CFR will also result in significant financial savings, thereby saving Federal resources. In FWS’s final designations, UTM coordinate pairs or other textual descriptions of the boundaries of areas often account for more than half of the rulemaking document;

therefore, eliminating the requirement to publish those textual descriptions will result in significant savings of **Federal Register** publication costs. For example, FWS spent \$764,523 in fiscal year 2008, \$539,639 in fiscal year 2009, and \$662,952 in fiscal year 2010 to publish critical habitat designations in the **Federal Register**, for a total of \$1,967,114 for the three fiscal years combined. If, based on the percentage of critical habitat **Federal Register** pages that were devoted in 2010 to textual descriptions, we estimate that 50 percent of those total costs were spent on the publication of the textual descriptions of the boundaries, then publishing those descriptions cost the Service \$983,557 for the three fiscal years, or \$327,852 per fiscal year.

In addition, the regulation portion of the rule, including the maps and textual descriptions of the boundaries, is reprinted annually in the CFR, resulting in a further expenditure of taxpayer resources. FWS spent \$80,000 in fiscal year 2008, \$92,400 in fiscal year 2009, and \$83,160 in fiscal year 2010 to reprint critical habitat designations in the CFR. Based on a review of the current volume (i.e., number of pages) of critical habitat designations represented in the CFR, we estimate that the textual descriptions account for approximately 75 percent of the volume and therefore 75 percent of the printing costs. Using the estimated 75 percent as the cost of reprinting the textual descriptions of the boundaries, publishing those descriptions cost FWS \$191,670 for the three fiscal years. Adding this to the **Federal Register** costs discussed above, we estimate that the annual cost for publishing textual descriptions of boundaries in the **Federal Register** and then reprinting them in the CFR is nearly \$391,742 for FWS alone. Thus, eliminating the need to publish latitude-longitude coordinates, UTM coordinate



pairs, or other detailed textual descriptions in the **Federal Register** and CFR would result in a significant cost savings to the Services and the public as a whole.

Finally, relying on maps and brief textual descriptions to identify areas designated as critical habitat is consistent with the Act. Section 4(a)(3)(A) of the Act only requires that critical habitat be designated “by regulation.” Moreover, section 4(b)(5)(A) of the Act indicates that the Secretary shall “not less than 90 days before the effective date of the regulation—(i) publish a general notice and the complete text of the proposed regulation in the **Federal Register**, and (ii) give actual notice of the proposed regulation (including the complete text of the regulation).” We interpret the mandate to publish the “complete text” of the proposed regulation as requiring that the regulation provide a sufficiently detailed description of the area included within the proposed designation, in the form of maps and any accompanying text, so as to provide all interested persons with an understanding of, and a meaningful opportunity to comment on, the critical habitat boundaries. As is already the current practice with critical habitat designations containing detailed UTM coordinates as required by the existing regulations, the public will be able to refer to any additional supporting information we make available through our outreach efforts, Internet sites, and at the lead field office responsible for the designation to assist the public in understanding the official boundary.

We note that the Services never maintained that requiring detailed textual descriptions was legally necessary. Instead, the first critical habitat regulations required only that critical habitat designations be “accompanied by maps and/or geographical

descriptions.” 43 FR 870, 876 (Jan. 4, 1978). Although the Services subsequently added the requirement that critical habitat designations include textual descriptions describing the specific boundary limits of the critical habitat, there is nothing in the preamble to that rule indicating that the Services did so because the Act required it. Rather, it was in response to several commenters, who had opined that the proposed rule was not sufficiently clear in setting out the method by which critical habitat boundaries would be described. 45 FR 13009, 13015 (Feb. 27, 1980). With this change, the regulations would continue to be explicit as to the method by which critical habitat boundaries would be described; it would just do so by means that do not require detailed textual descriptions.

### **Summary of Comments and Recommendations**

In the proposed rule published on May 17, 2011 (76 FR 28405), we requested that all interested parties submit written comments on the proposal by July 18, 2011. We also contacted appropriate Federal and State agencies, scientific experts and organizations, and other interested parties, and invited them to comment on the proposal. We did not receive any requests for a public hearing.

During the comment period for the proposed rule, we received 14 comment letters directly addressing the proposed regulations for requirements to publish textual descriptions of boundaries of critical habitat. Five commenters supported the proposal, 8 commenters opposed it, and one commenter was neutral. All substantive information provided during comment periods has either been incorporated directly into this final

determination or addressed below.

### *Federal Agency Comments*

- (1) Comment: Two Federal agencies suggested that we provide a link and a point of contact within the Federal Register publication to the internet sites maintained by both Services.

Our Response: We will provide a link and a point of contact within the Federal Register publication to the internet sites that will house the GIS information regarding the location of critical habitat.

- (2) Comment: Two Federal agencies suggested we provide more information on our GIS maps, such as detailed scale, legend, scale bar, north arrow, title, source, the date critical habitat was finalized, and Federal Register citation.

Our Response: We will provide as much information as possible on the GIS maps to improve their usefulness.

### *Comments from States*

Section 4(i) of the Act states, “[T]he Secretary shall submit to the State agency a written justification for his failure to adopt regulations consistent with the agency’s

comments or petition.” Comments received from State agencies regarding the proposal to revise the implementing regulations requiring textual descriptions of critical habitat boundaries are addressed below.

(3) Comment: Technical publishing limitations can create a barrier to utilizing the best scientific data available in the pictorial maps published in the Federal Register.

Our Response: Although it is true there are technical publishing limitations imposed by the Federal Register regarding map size and detail, these limitations will not affect our mandated practice of using the best available science. In addition, if there are limitations imposed due to map size such that additional rule text would be necessary to ensure that interested persons have adequate notice to afford them a meaningful opportunity to comment on the critical habitat boundary, we will provide language in the rule text to clarify the map. Plus, the coordinates and/or plot points from which the maps are generated will be included in the administrative record for the designation, and will be available to the public on the Internet site of the Service promulgating the designation, at [www.regulations.gov](http://www.regulations.gov), and at the lead field office of the Service responsible for the designation. For the convenience of the public, we will continue to provide additional tools and supporting information on our Internet sites and at the lead field office of the Service that is responsible for the critical habitat designation (and some of this information

may also be included in the preamble and/or at [www.regulations.gov](http://www.regulations.gov)).

(4) Comment: Pictorial maps cannot always provide the same level of detail that a textual description can provide.

Our Response: Although maps may not be as detailed as UTM and latitude-longitude coordinates, the maps and any accompanying textual description published in the Federal Register will provide sufficient notice to the public of the designation. We are not prohibiting textual descriptions. We always have the option to include them, and if we determine they are needed to ensure the public has adequate notice, we will include them in the rule text. We will also include in the administrative record for the designation the coordinates and/or plot points on which the maps are based, and will make them available to the public on the Internet site of the Service promulgating the designation, at [www.regulations.gov](http://www.regulations.gov), and at the lead field office of the Service responsible for the designation. In addition, as is the current practice, if we determine that any other supporting information or additional tools would help the public understand the official boundary map, we will make them available on our Internet sites and at the lead field office responsible for the designation (and we may also include such information in the preamble and/or at [www.regulations.gov](http://www.regulations.gov)).

(5) Comment: Under the proposed change, access to the GIS data underlying the maps would be restricted.

Our Response: Access to the GIS data underlying the maps would continue to be available on our Internet sites and from the lead field office of the Service responsible for the critical habitat designation. We will also make hard copies available for individuals who do not have access to the internet upon request at our field offices. Our statement that “we do not think it is necessary for the public to have UTM or latitude-longitude coordinates in order to know where critical habitat is located,” is based on our understanding that for the last few years the public has not used the UTM or latitude-longitude coordinates to determine if their property is located in critical habitat areas, and that the UTM and latitude-longitude coordinates published in the Federal Register have not helped most individuals determine if their property is in or out of critical habitat designations, because they would need to have access to USGS quadrangle maps in order to plot the coordinates to determine the boundaries of critical habitat. We will continue to include in the administrative record the coordinates and/or plot points on which the maps are based, and we will make those coordinates and/or plot points available to the public on our Internet sites and at the lead field office of the Service responsible for the critical habitat designation, and at [www.regulations.gov](http://www.regulations.gov), but will not publish these data in the Federal Register.

- (6) Comment: The Service’s intention to address the technical publishing limitations by directing the public to their Internet sites and local offices for

more information is inadequate.

Our Response: As discussed in our response to comment 4, we will address the technical publishing limitations by including whatever explanatory text the Service responsible for the designation determines is necessary to ensure the public has adequate notice of the designation. In addition, the coordinates and/or plot points from which the maps are generated will be included in the administrative record for the designation, and will be available to the public on the Internet site of the Service promulgating the designation, at [www.regulations.gov](http://www.regulations.gov), and at the lead field office of the Service responsible for the designation. For the convenience of the public, we will continue the current practice of making available on the Internet site and at the local field office of the designating Service any supporting information or additional tools that it determines would help the public understand the official boundary map.

(7) Comment: The reliance on pictorial maps would affect the Services' ability to analyze the primary constituent elements (PCE), economic, national security, or other relevant impacts and the ability of the States and the public to consider and comment on these issues.

Our Response: The Services are not changing the way we analyze the physical and biological features essential to the conservation of the species, including the primary constituent elements, economic, national security, or other

relevant impacts. We will continue to define the critical habitat areas with coordinate data and use that data to generate the critical habitat map contained in the rule. The only difference from the way we presently are operating is that we would no longer publish the coordinate data in the Federal Register. The States and the public would still have that information in the supporting administrative record, and would be able to obtain it on our Internet sites, at [www.regulations.gov](http://www.regulations.gov), and at the lead field office of the Service responsible for the critical habitat designation.

- (8) Comment: Internet site addresses that contain the critical habitat boundaries should be provided in easily accessible locations for both the proposed and final rules.

Our Response: We will continue to provide the critical habitat boundary information on our Internet sites and at the lead field office of the Service responsible for the critical habitat designation and will make it available at [www.regulations.gov](http://www.regulations.gov) for easy access. We will also continue to publish the Internet sites and local office addresses in the Federal Register for both the proposed and final critical habitat rules.

- (9) Comment: Complete metadata related to critical habitat maps, as well as a complete legal description of the boundary, should be available on the Services' Internet sites and at all local field offices within the region of the



designation.

Our Response: We will provide this information on our Internet sites and at the lead field office of the Service responsible for the critical habitat designation (and we may also make it available at [www.regulations.gov](http://www.regulations.gov)).

- (10) Comment: In describing the proposed and final critical habitat boundary designation, the maps and data used in the Federal Register and other information vehicles should include references to how accurate the underlying data are and what at least the essential elements of the metadata are.

Our Response: Information about the metadata and the accuracy of the data will be provided in the supporting rulemaking files for the proposed and final critical habitat boundaries. We will not publish this information in the Federal Register.

- (11) Comment: Critical habitat boundaries should be available in a geographic information system (GIS) compatible format for downloading.

Our Response: We concur, and we will provide GIS maps on our Internet sites and at the lead field office of the Service responsible for the critical habitat designation (and we may also make it available at [www.regulations.gov](http://www.regulations.gov)).

## *Public Comments*

(12) Comment: Three commenters fully support the proposal, because it would significantly streamline the process of designating critical habitat, would not weaken the effectiveness of the Act for wildlife, and would not undermine the public's ability to identify the boundaries of proposed and final critical habitat designations.

Our Response: We appreciate the comments, and agree.

(13) Comment: One commenter stated that there was inconsistent language in the proposed rule that should be clarified and corrected. In 50 CFR 424.12(c) we use an "and" between the clauses and in 50 CFR 424.18(a) we use an "or" between the clauses.

Our Response: We do not believe that the language is inconsistent as proposed. The "and" between the phrases in 50 CFR 424.12(c) is referring to the detailed information that will be provided in the preamble for each critical habitat designation. This information will also be on our Internet sites and at the lead field office of the Service responsible for the critical habitat designation. The "or" between the clauses in 50 CFR 424.18(a) is referring to the additional tools and supporting information that we will make

available if we determine it would help the public understand the official boundary map. Such additional tools or supporting information may be published in the preamble of the rulemaking document or at [www.regulations.gov](http://www.regulations.gov), or—depending on the size, detail, etc.—may only be made available from our Internet sites and the lead office of the Service responsible for the designation.

- (14) Comment: Two commenters stated the definitive regulatory text is necessary to set forth the extent of critical habitat, its intended function and purpose, its regulatory basis, and any related interpretations.

Our Response: We will continue to provide textual descriptions as necessary for purposes of clarifying or refining the location and boundaries of each area or to explain the exclusion of sites (e.g., paved roads, buildings) within the mapped area. The major change from the way we are currently doing business is that we would not publish the coordinates of the critical habitat boundaries in the Federal Register. This information would still be part of the administrative record underlying the designation, and will be available to the public on the Internet site of the Service promulgating the designation, at [www.regulations.gov](http://www.regulations.gov), and at the lead field office of the Service responsible for the designation.

- (15) Comment: The proposed rule raises the possibility of overbroad designations

of critical habitat made without careful prior analysis of the primary constituent elements, areas of exclusion for existing facilities, and delineation of the critical habitat boundaries.

Our Response: We are not changing the way we analyze physical and biological features essential to the conservation of the species, including the primary constituent elements, areas of exclusion for existing facilities or delineation of the critical habitat boundaries. We will continue to generate the coordinates of the boundaries of the critical habitat, which will in turn provide the basis for the maps and any necessary textual descriptions published in the Federal Register. Therefore, the coordinate information will be part of the rulemaking files and will be available to the public. This will save the Federal government money, and provide better and easier public access to the data.

(16) Comment: One commenter asked why the public was left out of the 50 CFR 424.16(ii) language.

Our Response: This section only applies to State and local governments. The public is always invited to comment, and this in no way prevents that from occurring.

(17) Comment: One commenter wanted to know at whose discretion is the

optional additional textual data provided, and what criteria go into that decision.

Our Response: The discretion would fall to the Secretary of the Interior for critical habitat being designated by the Fish and Wildlife Service and to the Secretary of Commerce for critical habitat being designated by the National Marine Fisheries Service. The conditions that would lead the designating Secretary to make the decision to publish rule text in addition to the maps would include instances in which the rule text is necessary to ensure that the public has adequate notice of the location and boundaries of the designation or to explain the exclusion of sites (e.g., paved roads, buildings) within the mapped area.

(18) Comment: One commenter stated that this proposal makes an already inadequate and unlawful notification system even worse by removing all meaningful constraints and requirements on how the Services designate critical habitat.

Our Response: This regulation change does not alter how the Services designate critical habitat. Under the Administrative Procedure Act, the designating Service must ensure that the public has adequate notice to provide meaningful comment on the proposed designation. To do this, the

notice of proposed rulemaking must fairly apprise interested persons of the issues in the rulemaking, and the agency must make available the data on which the rule is based. In the context of designation of critical habitat, this means, among other things, that the notice must fairly apprise interested persons as to what areas may be included in the final designation, and the designating Service must make available the coordinate information and/or plot points on which the maps published in the Federal Register are based. It is our intent that every designation issued pursuant to these revised regulations meet this standard. This rule would simply allow us to eliminate publishing the rarely-used coordinate data in the Federal Register, while still providing the public with adequate notification.

(19) Comment: The Services are violating the Act by unlawfully shifting the burden of demonstrating what is or is not critical habitat to the landowner by this proposed rule change.

Our Response: This rule change would not shift the responsibility of determining which specific areas are critical habitat to the landowner; this would still be the responsibility of the Services. The map combined with any additional rule text should provide adequate notice to the public regarding the critical habitat boundaries. Landowners would have no added burden of demonstrating what is or is not critical habitat, and as with critical habitat designations under the existing regulations, will continue to have access to

the coordinates and/or plot points underlying the maps, as well as all of the additional tools and supporting information the Service responsible for the designation routinely makes available to help the public understand the official boundary.

(20) Comment: The Services' proposal violates the Act's mandate that the agencies designate specific, not general, areas.

Our Response: The Services would continue to be responsible for identifying specific areas, to the maximum extent prudent and determinable, that meet the definition of critical habitat in the Act. The changes to the regulations discussed herein will not have any effect or bearing on that statutory requirement. We have determined, however, that the manner in which we have been describing the boundaries of the specific areas in our Federal Register document is not the most helpful or useful to the public.

(21) Comment: One commenter stated that removal of the textual descriptions of critical habitat would violate the Act.

Our Response: Relying on maps and brief textual descriptions to identify areas designated as critical habitat is consistent with the Act, as explained above. In fact, the current requirement to publish the textual descriptions is not found in the Act itself, but in our implementing regulations. With this

change, the implementing regulations would continue to prescribe the manner in which the Secretaries will delineate critical habitat boundaries; the manner those regulations prescribe for delineating critical habitat boundaries would leave to the discretion of the agencies whether it was necessary to include the publication of textual descriptions in the Federal Register in a particular designation.

(22) Comment: The Services' assertion that even more limited descriptions of critical habitat will be sufficient to inform the public is unsupported and wrong, because map scales are too general to be of much use to individual landowners.

Our Response: It is true that due to technical publishing limitations, the scale of some maps that will be published in the Federal Register may necessitate that we provide explanatory text for clarification. If the maps are ambiguous such that rule text would be needed to ensure the public has adequate notice of the designation, we will include accompanying text in the rule. Moreover, as with critical habitat designations under the existing regulations, the public will continue to have access to the coordinates and/or plot points underlying the maps, as well as all of the additional tools and supporting information the Service responsible for the designation routinely makes available to help the public understand the official boundary.



(23) Comment: The Services' proposal supplants established surveying techniques with unspecified general descriptions to the detriment of private landowners.

Our Response: We would continue to use established surveying techniques for defining the boundaries of critical habitat, which would then be represented in the maps and any accompanying textual descriptions in the Federal Register.

(24) Comment: One commenter stated that publishing only a detailed description of the critical habitat violates the Act, which requires publication of the complete text of the critical habitat.

Our Response: We interpret the mandate to publish the "complete text" of the proposed regulation as requiring that the regulation provide a sufficiently detailed description of the area included within the proposed designation so as to provide all interested persons with an understanding of the critical habitat boundaries and a meaningful opportunity to comment on those boundaries. The regulation changes will allow us to continue to meet that mandate by publishing maps of the critical habitat boundaries.

(25) Comment: The Services' proposed changes would deny landowners due process.

Our Response: We will continue to provide a sufficiently detailed description in the **Federal Register** of the critical habitat area in the form of maps and any accompanying rule text that is needed to provide landowners with a meaningful opportunity to comment. We will also continue to include within the administrative record for the designation the coordinates and/or plot points that were used to generate the maps and will make this data available on the Services' Internet sites, [www.regulations.gov](http://www.regulations.gov), and at the lead field office of the Service responsible for the designation. In addition, as we already do under the existing regulations, whenever we conclude that additional tools or supporting information would help the public understand the official boundary, we will make those materials available on our Internet sites and at the lead field office of the Service responsible for the critical habitat designation (and we may also provide them at [www.regulations.gov](http://www.regulations.gov)). These changes will continue to provide landowners due process, as they will not alter the nature of the information the public currently uses to identify critical habitat boundaries.

(26) Comment: The projected cost savings is minuscule compared to the increased cost burdens that will be imposed on individual property owners.

Our Response: We do not anticipate that this change would impose increased cost burdens on individual property owners. The critical habitat boundaries

will be reflected in maps and any accompanying text published in the Federal Register. In addition, individual property owners will be able to easily access additional information regarding the critical habitat designation on our Internet sites, at [www.regulations.gov](http://www.regulations.gov), and at the lead field office of the Service responsible for the critical habitat designation. We will not only save Federal monies, but also reduce the cost burden on individual property owners by making critical habitat information easier to obtain.

(27) Comment: The Services should provide written notice directly to the owners of land by mail whenever they propose to include land in a critical habitat designation.

Our Response: In addition to the Federal Register notices, the Services provide notification through outreach materials including press releases and legal notices in newspapers of the affected areas. We believe these outreach efforts are sufficient to inform the public about proposed critical habitat designations. Notifying property owners by mail would be costly, time consuming, and largely duplicative of our current outreach efforts.

(28) Comment: The Services should publish maps in the Federal Register of a sufficient scale and with sufficient detail to allow a landowner to determine whether their property falls within a proposed critical habitat designation.

Our Response: The Federal Register limitations on map size and detail prevent the Services from being able to improve upon the present maps being published in the Federal Register. We will publish maps in the Federal Register in as detailed a manner as possible, given the technical limitations. For designations with large-scale maps, the map itself may leave ambiguity as to whether a particular property is within the mapped boundaries (and therefore covered by the critical habitat designation). When the designating Service determines that additional regulatory text clarifying ambiguities in the map is needed to ensure that the public would have adequate notice of the critical habitat boundaries, the designating Service will provide additional regulation text. The designating Service will ensure that the notice of proposed rulemaking provides sufficient notice of the boundary of the proposed designation to afford the public a meaningful opportunity to comment on it. Moreover, the Services will make available the underlying rulemaking files for the proposed and final rule (including the coordinate information and/or plot points on which the maps published in the Federal Register are based).

(29) Comment: One commenter was concerned that if the proposed rule is adopted, it will reduce information that must be published in the Federal Register when designating critical habitat, and would potentially provide the opportunity to change the information available at agencies without going through rulemaking.

Our Response: We would not be able to change the critical habitat designation without going through the rulemaking process. We have acknowledged that what is printed in the **Federal Register** and subsequently in the CFR will be the legally binding delineation of critical habitat. Should there be ambiguity due to the scale of the map such that additional regulatory text clarifying ambiguities in the map is needed to ensure that the public would have adequate notice of the boundaries, we will provide additional regulation text. The only change in the **Federal Register** would be the lack of the detailed coordinate data of the boundaries of the specific areas being designated as critical habitat (i.e., latitude-longitude and UTM coordinates). We would still generate that data, and would make it available on our Internet sites, at [www.regulations.gov](http://www.regulations.gov), and at the lead field office of the Service responsible for the critical habitat designation. Neither the critical habitat designation published in the Federal Register, nor the underlying data on which it is based, could be changed without undergoing a further rulemaking.

- (30) Comment: One commenter stated that the proposed approach could create significant concerns if implemented in a manner that designates wide swaths of lands on a map, only certain areas of which contain the physical and biological features necessary for conservation of the species.

Our Response: The way we designate critical habitat would not change. This rule change would simply remove the requirement that we publish the reference points (i.e., textual descriptions) in the Federal Register and reprint them annually in the CFR. In addition, in instances where there are areas within a bigger area that do not contain the physical and biological features necessary for the conservation of the species, the Services would have the option of drawing the map to reflect only those parts of the area that do contain those features, or including a textual description that excludes from the designation specific areas that do not contain those features.

(31) Comment: One commenter proposes that we add the following sentence to 50 CFR 424.18(a): “General descriptions of the location and boundaries of each area may be provided for clarification purposes or to explain the exclusion of sites (e.g., paved roads, buildings, etc.) within the mapped area.”

Our Response: We have inserted that language in 50 CFR 424.12(c). We do not believe it is necessary to repeat this in 50 CFR 424.18(a).

(32) Comment: One commenter was concerned about the removal of the textual

descriptions of existing final critical habitat boundaries set forth in the CFR and whether the broad scale maps would increase critical habitat.

Our Response: Removing the coordinate data from the **Federal Register** and CFR will not increase or otherwise change the critical habitat boundaries or areas. We are merely planning to remove the reference points (i.e., UTM or latitude-longitude coordinates) of the textual descriptions from existing final critical habitat designations in the **Federal Register** and CFR in future rule making. We will, however, continue to provide this information on our Internet sites, at [www.regulations.gov](http://www.regulations.gov), and at the lead field office of the Service responsible for the critical habitat designation

(33) Comment: One commenter stated that, without the requirement of a written description, there is no assurance that the maps will or will not indicate the boundary of the critical habitat.

Our Response: We are making the textual descriptions optional. This means we will not, in most cases, publish the reference points (i.e., UTM or latitude-longitude coordinates) in the **Federal Register**. However, every critical habitat designation must include a map delineating the critical habitat boundary, and may also include general textual descriptions for clarification purposes or to explain the exclusion of sites (e.g., paved

roads, buildings, etc.) within the mapped area. The critical habitat map, combined with any general textual descriptions included in the rule text, will provide the public with adequate notice of where the boundary of the critical habitat designation is located. As we have acknowledged, therefore, the final rule published in the **Federal Register** and subsequently in the CFR will continue to contain the legally binding delineation of critical habitat. However, if for some reason a member of the public is uncertain about the boundaries of a particular critical habitat designation even after reading the map and any regulatory text, they will continue to have access to the coordinates and/or plot points underlying the maps, as well as all of the additional tools and supporting information the Service responsible for the designation already routinely makes available to assist the public in understanding the official boundary.

- (34) Comment: One commenter stated that our proposed changes to 50 CFR 17.94(b) (Each Critical Habitat area will be shown on a map, with more-detailed information discussed in the preamble of the rulemaking documents published in the Federal Register and made available from the lead field office of the Service responsible for such designation) was in conflict with our proposed changes to 50 CFR 424.18(a) (The Service may also create additional explanatory text, information, or maps and include them in the preamble of the rulemaking document or make them available from the lead office responsible for the designation).



Our Response: The two provisions referenced by the commenter are consistent. Both provisions have two components. The first component requires that the detailed description of the action contained in the Federal Register rule and then in the CFR will include a map delineating the boundary of the designation. This can be found at 50 CFR 424.18(a) (“For a rule designating or revising critical habitat, the detailed description of the action will include a map that delineates the official boundary of the designation.”) and at 50 CFR 17.94(b) (“Each Critical Habitat area will be shown on a map ....”). The requirement to include a map in the detailed description of the action does not eliminate the option of also including additional clarifying rule text within that detailed description. The second component of the two provisions outlines ways to provide more information that we believe would be helpful to inform the public on the location of critical habitat above and beyond the detailed description of the action. This can be found at 50 CFR 17.94(b) (“with more-detailed information discussed in the preamble of the rulemaking documents published in the **Federal Register** and made available from the lead field office of the Service responsible for such designation.”) and at 50 CFR 424.18(a) (“The Service responsible for the designation will include more-detailed information in the preamble of the rulemaking document and will make the coordinates and/or plot points on which the map is based available to the public on the Internet site of the Service promulgating the designation, at [www.regulations.gov](http://www.regulations.gov), and at the lead field office of the Service responsible for the designation. In addition, if the Service responsible for the designation concludes that additional tools or supporting information would be appropriate and would help the public understand the official boundary map, it will, for

the convenience of the public, make those additional tools and supporting information available on our Internet sites and at the lead field office of the Service that is responsible for the critical habitat designation (and may also include it in the preamble and/or at [www.regulations.gov](http://www.regulations.gov))). Therefore, in accordance with 50 CFR 17.94(b), the more-detailed information we provide in the preamble of the rulemaking document will also be available from the lead Service office responsible for the designation. Any additional tools or supporting information—explanatory text, information, or maps—that we may provide would, in accordance with 50 CFR 424.18(a), be available through our Internet sites and at the lead field office responsible for the designation, and depending on the size and format of that supporting information, it may also be included in the preamble to the rulemaking document and/or at [www.regulations.gov](http://www.regulations.gov). Also under 50 CFR 424.18(a), the coordinates and/or plot points on which the map is based would be available at the Internet site and lead field office of the Service promulgating the designation and at [www.regulations.gov](http://www.regulations.gov).

## **Regulation Changes**

### **50 CFR 17.94(b)**

The existing regulation states that the map provided by the Director does not, unless otherwise indicated, constitute the definition of the boundaries of a critical habitat. In order to provide more clarity regarding the areas being designated, as well as be more

efficient and cost-effective, we are changing the wording of the first sentence to state, “For the critical habitat designations published and effective after [INSERT DATE 30 DAYS AFTER DATE OF FEDERAL REGISTER PUBLICATION], the map provided by the Secretary of the Interior, as clarified or refined by any textual language within the rule, constitutes the definition of the boundaries of a critical habitat.” We are replacing “the Director” with “the Secretary of the Interior” since the authority to designate critical habitat under the Act lies with the Secretary due to the Secretarial discretion under section 4(b)(2) of the Act to exclude specific areas from final critical habitat. We are limiting application of the new language to critical habitat designations published after the effective date of the final rule. For existing critical habitat designations, we also intend to remove the textual descriptions of final critical habitat boundaries set forth in the CFR in order to save the annual reprinting cost, but we must do so in separate rulemakings to ensure that removing the textual descriptions does not change the existing boundaries of those designations.

The second sentence of the existing regulation states, “Such maps are provided for reference purposes to guide Federal agencies and other interested parties in locating the general boundaries of the Critical Habitat.” We are revising this sentence to read “Each Critical Habitat area will be shown on a map, with more-detailed information discussed in the preamble of the rulemaking documents published in the **Federal Register** and made available from the lead field office of the Service responsible for such designation.” We believe this will provide greater clarity regarding the areas being designated, as well as be a more efficient and cost-effective way to provide information

to the public concerning areas designated as critical habitat. We acknowledge that what is printed in the **Federal Register** and subsequently in the CFR will be the legally binding delineation of critical habitat. In addition, the Services will include more-detailed information in the preamble of the rulemaking document and will make the coordinates and/or plot points on which the official map is based available to the public on the Internet site of the Service promulgating the designation, at [www.regulations.gov](http://www.regulations.gov), and at the lead field office of the Service responsible for the designation. Furthermore, if the Service responsible for the designation concludes that additional tools or supporting information would be appropriate and would help the public understand the official boundary map, it will, for the convenience of the public, make those additional tools and supporting information available on our Internet sites and at the lead field office of the Service that is responsible for the critical habitat designation (and may also include it in the preamble and/or at [www.regulations.gov](http://www.regulations.gov)).

We are replacing the third existing sentence, which currently reads, “Critical habitats are described by reference to surveyable landmarks found on standard topographic maps of the area and to the States and county(ies) within which all or part of the Critical Habitat is located.” The new wording will be “Each area will be referenced to the State(s), county(ies), or other local government units within which all or part of the Critical Habitat is located. General descriptions of the location and boundaries of each area may be provided to clarify or refine what is included within the boundaries depicted on the map, or to explain the exclusion of sites (e.g., paved roads, buildings) within the mapped area.” This change will relieve us of the regulatory and financial burden of publishing the textual descriptions of the boundaries of critical habitat in the regulations,

which have shown to be of limited use to the general public.

#### **50 CFR 226.101**

This section addresses critical habitat designations made by the Secretary of Commerce. We are replacing the “Maps and charts identifying designated critical habitat...” phrase in the beginning of the last sentence with “Additional information regarding designated critical habitat....” This new language will provide the flexibility needed to provide any kind of useful information to the public concerning areas designated as critical habitat, and not just maps and charts.

#### **50 CFR 424.12(c)**

We are removing the references to defining critical habitat by specific limits using reference points and lines as found on standard topographic maps of the area. The revision will read, “Each Critical Habitat area will be shown on a map, with more-detailed information discussed in the preamble of the rulemaking documents published in the **Federal Register** and made available from the lead field office of the Service responsible for such designation.” This revision will provide more clarity regarding the areas being designated, as well as relieve the regulatory and financial burden of both Services being required to print these reference points in the **Federal Register** and reprint them annually in the CFR. We acknowledge that what is printed in the **Federal Register** and subsequently in the CFR will be the legally binding delineation of critical

habitat. However, should there be ambiguity due to the scale of the map such that regulatory text clarifying the ambiguity is needed to ensure that the public would have adequate notice of the designation, the Services will include clarifying rule text. The designating Service will make the coordinates and/or plot points on which the map is based available to the public on the Internet site of the Service promulgating the designation, at [www.regulations.gov](http://www.regulations.gov), and at the lead field office of the Service responsible for the designation. In addition, if the Service responsible for the designation concludes that additional tools or supporting information would be appropriate and would help the public understand the official boundary map, it will, for the convenience of the public, make those additional tools and supporting information available on our Internet sites and at the lead field office of the Service that is responsible for the critical habitat designation (and may also include it in the preamble and/or at [www.regulations.gov](http://www.regulations.gov)). In the future, we intend to remove the textual descriptions of final critical habitat boundaries set forth in the CFR for existing critical habitat designations in separate rulemakings in order to save the annual reprinting cost, without changing those boundaries.

We are adding the following sentence to this regulation: “Textual information may be included for purposes of clarifying or refining the location and boundaries of each area or to explain the exclusion of sites (e.g., paved roads, buildings) within the mapped area.”

**50 CFR 424.16(b)**

The change to this section is in the first sentence where it currently states, “A notice of a proposed rule to carry out one of the actions described in § 424.10 shall contain the complete text of the proposed rule.” We are changing the wording “shall contain the complete text of the proposed rule” to “will contain a detailed description of the proposed action.” Although we will in fact publish the complete proposed critical habitat designation, it could be confusing to require that the notice of a proposed critical habitat designation contain “the complete text” of the proposed regulation,” since as a result of the other changes in this notice, the boundaries of a critical habitat designation may be identified using only a map. Because the regulation will consist of the legally binding detailed description of the designation, which will include the map, we included the language “will contain a detailed description of the proposed action” to clarify that the proposed rule must include the maps, and may include any accompanying text, that establish the legal boundary of the designation. We also added that the proposed rule “may also include rule text that clarifies or modifies the map” to make clear that the designating Service has the option of including textual descriptions that clarify or modify the map.

#### **50 CFR 424.16(c)(1)(ii)**

The change to this section is that we have removed the parenthetical phrase “(including the complete text of the regulation).” As stated above, although we would still give notice of the complete proposed critical habitat designation, it could be

confusing to require that the notice include the “complete text” of the designation, since as a result of the other changes in this notice, we are interpreting the “complete text” of the designation to be the map, along with any optional rule text that may clarify the map. As discussed above, the Services will include more-detailed information in the preamble of the rulemaking document and will make the coordinates and/or plot points on which the map is based available to the public on the Internet site of the Service promulgating the designation, at [www.regulations.gov](http://www.regulations.gov), and at the lead field office of the Service responsible for the designation. In addition, if the Service responsible for the designation concludes that additional tools or supporting information would be appropriate and would help the public understand the official boundary map, it will, for the convenience of the public, make those additional tools and supporting information available on our Internet sites and at the lead field office of the Service that is responsible for the critical habitat designation (and may also include it in the preamble and/or at [www.regulations.gov](http://www.regulations.gov)).

#### **50 CFR 424.18(a)**

This section addresses the final rule requirements. In the second sentence of the existing regulation, we are replacing “the complete text of the rule” with “a detailed description of the action being finalized.” As with the sections above that deal with the requirements for a proposed rule, changing the wording here, along with the other changes proposed in this notice, will clarify that the final rule must contain the detailed description of the designation as reflected in the map and any optional additional rule text



that clarifies or refines the map. As discussed above, the Services will include more-detailed information in the preamble of the rulemaking document and will make the coordinates and/or plot points on which the map is based available to the public on the Internet site of the Service promulgating the designation, at [www.regulations.gov](http://www.regulations.gov), and at the lead field office of the Service responsible for the designation. In addition, if the Service responsible for the designation concludes that additional tools or supporting information would be appropriate and would help the public understand the official boundary map, it will, for the convenience of the public, make those additional tools and supporting information available on our Internet sites and at the lead field office of the Service that is responsible for the critical habitat designation (and may also include it in the preamble and/or at [www.regulations.gov](http://www.regulations.gov)). Because the regulation will consist of the legally binding detailed description of the designation, which will include the map, we included the language “will contain a detailed description of the proposed action” to clarify that the final rule must include the maps, and may include any accompanying text, that establish the legal boundary of the designation.

In the fourth sentence of the existing regulation, we are removing the references to the final rule containing a description of the boundaries of the critical habitat being designated. We are modifying this section and expanding the discussion on the requirement for a map. The new section will read, “For a rule designating or revising critical habitat, the detailed description of the action will include a map of the critical habitat area, and may also include rule text that clarifies or modifies the map. The map itself, as modified by any rule text, constitutes the official boundary of the designation.

The Service responsible for the designation will include more-detailed information in the preamble of the rulemaking document and will make the coordinates and/or plot points on which the map is based available to the public on the Internet site of the Service promulgating the designation, at [www.regulations.gov](http://www.regulations.gov), and at the lead field office of the Service responsible for the designation. In addition, if the Service responsible for the designation concludes that additional tools or supporting information would be appropriate and would help the public understand the official boundary map, it will, for the convenience of the public, make those additional tools and supporting information available on our Internet sites and at the lead field office of the Service that is responsible for the critical habitat designation (and may also include it in the preamble and/or at [www.regulations.gov](http://www.regulations.gov)).” This change will provide more clarity regarding the areas being designated, and will assist the public in evaluating the coverage of the critical habitat designation, as well as allow us to reduce our printing costs in both the **Federal Register** and for the annual reproductions of the CFR.

## **Required Determinations**

### **Regulatory Planning and Review—Executive Order 12866**

The Office of Management and Budget (OMB) has determined that this rule is not significant under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria:

- a. Whether the rule will have an annual effect of \$100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or

other units of the government.

b. Whether the rule will create inconsistencies with other Federal agencies' actions.

c. Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

d. Whether the rule raises novel legal or policy issues.

### **Regulatory Flexibility Act (5 U.S.C. 601 et seq.)**

Under the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 et seq., whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this rule, if adopted, would not have a significant economic effect on a substantial number of small

entities as defined under the RFA. This certification is available upon request (see **ADDRESSES** section above).

This rule will revise the implementing regulations contained within 50 CFR 17.94(b), 226.101, 424.12(c), 424.16(b) and (c)(1)(ii), and 424.18(a), to eliminate the requirement to publish textual descriptions of proposed (NMFS only) and final (NMFS and FWS) critical habitat boundaries in the Federal Register and reprinting in the CFR, and instead provide that the map(s), as clarified or refined by any textual language within the rule, constitutes the definition of the boundaries of a Critical Habitat. A full description of the action, why it is being considered, and the legal basis for this action are contained in the preamble to this rule. The rule does not duplicate, overlap, or conflict with other Federal rules.

This rulemaking amends the procedural requirements for NMFS and FWS when designating critical habitat. NMFS and FWS are the only entities that are directly affected by this rule, and they are not considered to be small entities under SBA's size standards. Therefore, no small entities are directly affected by this rule.

The revisions to the implementing regulations herein are not expected to impose any direct costs on regulated entities. Although the Services will make additional information available to assist small entities in evaluating the coverage of the critical habitat delineated by the published maps, the Services already make such information available, and our understanding is that small entities and the public already routinely make use of such information. Therefore, eliminating the requirement to publish textual descriptions and instead publishing the maps in the **Federal Register** and making additional information available on the Internet site of the Service promulgating the

designation, at [www.regulations.gov](http://www.regulations.gov), and at local field offices would not impose any additional burden on small entities. The elimination of the procedural requirement to publish textual descriptions of proposed (NMFS only) and final (NMFS and FWS) critical habitat boundaries in the **Federal Register** and reprinting in the CFR is an administrative action, and it is intended to facilitate public understanding of the critical habitat designation process and make it easier for the public to determine if specific areas are within the critical habitat designation. In fact, this regulation would make the process more cost-effective for the agencies and the public as a whole, and would potentially save the FWS alone an estimated \$391,742 annually. Therefore, for the reasons above, this rule will not have a significant economic impact on a substantial number of small entities.

#### **Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)**

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), the Services make the following findings:

a. This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector and includes both “Federal intergovernmental mandates” and “Federal private sector mandates.” These terms are defined in 2 U.S.C. 658(5) – (7). “Federal intergovernmental mandate” includes a regulation that “would impose an enforceable duty upon State, local, or tribal governments” with two exceptions. It excludes “a condition of Federal assistance.” It

also excludes “a duty arising from participation in a voluntary Federal program,” unless the regulation “relates to a then-existing Federal program under which \$500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,” if the provision would “increase the stringency of conditions of assistance” or “place caps upon, or otherwise decrease, the Federal Government’s responsibility to provide funding,” and the State, local, or tribal governments “lack authority” to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; AFDC work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. “Federal private sector mandate” includes a regulation that “would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.”

b. This rule will not significantly or uniquely affect small governments, because the revisions to the implementing regulations herein will facilitate public understanding of the critical habitat designation process, and the areas included within the critical habitat, and make the process more cost-effective for the agencies and the public as a whole by potentially saving the FWS alone an estimated \$391,742 annually. As such, we do not believe that a Small Government Agency Plan is required.

## **Takings—Executive Order 12630**

In accordance with Executive Order 12630 (“Government Actions and Interference with Constitutionally Protected Private Property Rights”), we have evaluated the revised implementing regulations for designating critical habitat, and have determined that this rule does not pose significant takings implications. The revisions to the implementing regulations are intended to facilitate the public understanding of the rulemaking process for critical habitat. It does not involve individual property rights.

#### **Federalism—Executive Order 13132**

In accordance with Executive Order 13132 (Federalism), the rule does not have significant Federalism effects. A Federalism assessment is not required. The revisions to the regulations addressed in this rule are intended to facilitate the public understanding of the rulemaking process for critical habitat, and thus should not significantly affect or burden the authority of the States to govern themselves.

#### **Civil Justice Reform—Executive Order 12988**

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. The revisions to the regulations addressed in this rule are intended to facilitate the public understanding of the rulemaking process for critical habitat, and thus should not significantly affect or burden the judicial system.

## **Paperwork Reduction Act of 1995**

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

## **National Environmental Policy Act (NEPA)**

We analyzed this rule in accordance with the criteria of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4332(c)), 43 CFR part 46, and 516 Departmental Manual (DM) 2 and 8.

A categorical exclusion from NEPA documentation applies to policies, directives, regulations, and guidelines that are “of an administrative, financial, legal, technical, or procedural nature” (43 CFR 46.210(i)). However, even if an individual Federal action falls within a categorical exclusion, the Service must still prepare environmental documents pursuant to NEPA if one of the 12 exceptions listed in 43 CFR 46.215 applies.

We have reviewed each of the 12 exceptions and have found that because this rule is administrative in nature (i.e., we are making optional the inclusion of any textual



description of the boundaries of the designation in the **Federal Register**), none of the exceptions apply. Therefore, this action meets the requirements for a categorical exclusion from the NEPA process

### **Government-to-Government Relationship with Tribes**

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), Executive Order 13175 "Consultation and Coordination with Indian Tribal Governments," and the Department of the Interior Manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Native American Tribes on a government-to-government basis. We have evaluated the potential effects on federally recognized Tribes from these revisions to our implementing regulations for critical habitat. We have determined that there are no potential effects to federally recognized Tribes, since the revisions to the implementing regulations are intended to facilitate the public understanding of critical habitat designations and save taxpayer monies. We will, however, continue to coordinate with Tribes as we promulgate critical habitat designations.

## **Energy Supply, Distribution, or Use**

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. “Significant energy action” means any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking that is a significant regulatory action under Executive Order 12866 or any successor order, and is likely to have a significant adverse effect on the supply, distribution, or use of energy; or that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. This rule to revise the implementing regulations for designating critical habitat does not qualify as a significant regulatory action under Executive Order 12866 and will not have a significant adverse effect on the supply, distribution, or use of energy, and has not been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

### **Author(s)**

The primary authors of this package are staff members from the U.S. Fish and Wildlife Service and the National Marine Fisheries Service.

### **Authority**

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

### **List of Subjects in 50 CFR Parts 17, 226, and 424**

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

### **Regulation Promulgation**

Accordingly, we are amending parts 17, 226, and 424, title 50 of the Code of Federal Regulations, as set forth below:

## **CHAPTER I--UNITED STATES FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR**

### **PART 17--[AMENDED]**

1. The authority citation for part 17 continues to read as follows:

**Authority:** 16 U.S.C. 1361--1407; 16 U.S.C. 1531--1544; 16 U.S.C. 4201--4245; Pub. L. 99-625, 100 Stat. 3500; unless otherwise noted.

2. In § 17.94, revise paragraph (b) to read as follows:

#### **§ 17.94 Critical habitats.**

\* \* \* \* \*

(b) (1) For the critical habitat designations published and effective after [INSERT DATE 30 DAYS AFTER DATE OF FEDERAL REGISTER PUBLICATION], the map provided by the Secretary of the Interior, as clarified or refined by any textual language within the rule, constitutes the definition of the boundaries of a critical habitat. Each critical habitat area will be shown on a map, with more-detailed information discussed in the preamble of the rulemaking documents published in the **Federal Register** and made available from the lead field office of the Service responsible for such designation. Each area will be referenced to the State(s), county(ies), or other local government units within which all or part of the critical habitat is located. General descriptions of the location and boundaries of each area may be provided to clarify or refine what is included within the boundaries depicted on the map, or to explain the exclusion of sites (e.g., paved roads, buildings) within the mapped area. Unless otherwise indicated within the critical habitat descriptions, the names of the State(s) and county(ies) are provided for informational purposes only and do not constitute the boundaries of the area.

(2) For critical habitat designations published and effective on or prior to [INSERT DATE 30 DAYS AFTER DATE OF FEDERAL REGISTER PUBLICATION], the map provided by the Secretary of the Interior is for reference purposes to guide Federal Agencies and other interested parties in locating the general boundaries of the critical habitat. The map does not, unless otherwise indicated, constitute the definition of the boundaries of a critical habitat. Critical habitats are described by reference to surveyable landmarks found on standard topographic maps of the area and to the States and county(ies) within which all or part of the critical habitat is located. Unless otherwise indicated within the critical habitat description, the State and

county(ies) names are provided for informational purposes only.

\* \* \* \* \*

## **CHAPTER II--NATIONAL MARINE FISHERIES SERVICE, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, DEPARTMENT OF COMMERCE**

### **PART 226—[AMENDED]**

3. The authority citation for part 226 continues to read as follows:

**Authority:** 16 U.S.C. 1533.

4. Revise § 226.101 to read as follows:

#### **§ 226.101 Purpose and scope.**

The regulations contained in this part identify those habitats designated by the Secretary of Commerce as critical, under section 4 of the Act, for endangered and threatened species under the jurisdiction of the Secretary of Commerce. Those species are enumerated at § 223.102 of this chapter if threatened and at § 224.101 of this chapter if endangered. For regulations pertaining to the designation of critical habitat, see part 424 of this title; for regulations pertaining to prohibitions against the adverse modification or destruction of critical habitat, see part 402 of this title. Additional information regarding designated critical habitats that is not provided in this section may be obtained upon request to the Office of Protected Resources (*see* § 222.102, definition of “Office of Protected Resources”).

## **CHAPTER IV--JOINT REGULATIONS (UNITED STATES FISH AND**

**WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR AND NATIONAL  
MARINE FISHERIES SERVICE, NATIONAL OCEANIC AND ATMOSPHERIC  
ADMINISTRATION, DEPARTMENT OF COMMERCE); ENDANGERED  
SPECIES COMMITTEE REGULATIONS**

**PART 424—[AMENDED]**

5. The authority citation for part 424 continues to read as follows:

**Authority:** Pub. L. 93-205, 87 Stat. 884; Pub. L. 95-632, 92 Stat. 3751; Pub. L. 96-159, 93 Stat. 1225; Pub. L. 97-304, 96 Stat. 1411 (16 U.S.C. 1531 *et seq.*); unless otherwise noted.

6. In § 424.12, revise paragraph (c) to read as follows:

**§ 424.12 Criteria for designating critical habitat.**

\* \* \* \* \*

(c) Each critical habitat area will be shown on a map, with more-detailed information discussed in the preamble of the rulemaking documents published in the **Federal Register** and made available from the lead field office of the Service responsible for such designation. Textual information may be included for purposes of clarifying or refining the location and boundaries of each area or to explain the exclusion of sites (e.g., paved roads, buildings) within the mapped area. Each area will be referenced to the State(s), county(ies), or other local government units within which all or part of the critical habitat is located. Unless otherwise indicated within the critical habitat descriptions, the names of the State(s) and county(ies) are provided for informational purposes only and do not constitute the boundaries of the area. Ephemeral reference

points (e.g., trees, sand bars) shall not be used in any textual description used to clarify or refine the boundaries of critical habitat.

\* \* \* \* \*

7. In § 424.16, revise paragraphs (b) and (c)(1)(ii) to read as follows:

**§ 424.16 Proposed rules.**

\* \* \* \* \*

(b) Contents. A notice of a proposed rule to carry out one of the actions described in § 424.10 will contain a detailed description of the proposed action and a summary of the data on which the proposal is based (including, as appropriate, citation of pertinent information sources) and will show the relationship of such data to the rule proposed. If such a rule proposes to designate or revise critical habitat, such summary will, to the maximum extent practicable, include a brief description and evaluation of those activities (whether public or private) that, in the opinion of the Secretary, if undertaken, may adversely modify such habitat or may be affected by such designation. For any proposed rule to designate or revise critical habitat, the detailed description of the action will include a map of the critical habitat area, and may also include rule text that clarifies or modifies the map. Any such notice proposing the listing, delisting, or reclassification of a species or the designation or revision of critical habitat will also include a summary of factors affecting the species and/or its designated critical habitat.

(c) \* \* \*

(1) \* \* \*

(ii) Give actual notice of the proposed regulation to the State agency in each State in which the species is believed to occur and to each county or equivalent jurisdiction

therein in which the species is believed to occur, and invite the comment of each such agency and jurisdiction;

\* \* \* \* \*

8. In § 424.18, revise paragraph (a) to read as follows:

**§ 424.18 Final rules—general.**

(a) Contents. A final rule promulgated to carry out the purposes of the Act will be published in the **Federal Register**. This publication will contain a detailed description of the action being finalized, a summary of the comments and recommendations received in response to the proposal (including applicable public hearings), summaries of the data on which the rule is based and the relationship of such data to the final rule, and a description of any conservation measures available under the rule. Publication of a final rule to list, delist, or reclassify a species or designate or revise critical habitat will also provide a summary of factors affecting the species.

(1) For a rule designating or revising critical habitat, the detailed description of the action will include a map of the critical habitat area, and may also include rule text that clarifies or modifies the map. The map itself, as modified by any rule text, constitutes the official boundary of the designation.

(i) The Service responsible for the designation will include more-detailed information in the preamble of the rulemaking document and will make the coordinates and/or plot points on which the map is based available to the public on the Internet site of the Service promulgating the designation, at [www.regulations.gov](http://www.regulations.gov), and at the lead field office of the Service responsible for the designation.

(ii) In addition, if the Service responsible for the designation concludes that



additional tools or supporting information would be appropriate and would help the public understand the official boundary map, it will, for the convenience of the public, make those additional tools and supporting information available on our Internet sites and at the lead field office of the Service that is responsible for the critical habitat designation (and may also include it in the preamble and/or at [www.regulations.gov](http://www.regulations.gov)).

(2) The rule will, to the maximum extent practicable, include a brief description and evaluation of those activities (whether public or private) that might occur in the area and which, in the opinion of the Secretary, may adversely modify such habitat or be affected by such designation.

\* \* \* \* \*

Dated: April 18, 2012

Signed Eileen Sobeck

Acting Assistant Secretary for Fish and Wildlife and Parks  
U.S. Department of the Interior

Dated: April 4, 2012

Signed Alan D. Risenhoover

Acting Deputy Assistant Administrator for Regulatory Programs  
National Marine Fisheries Service

**Billing Codes 4310-55-P; 3510-22-P**

[FR Doc. 2012-10178 Filed 04/30/2012 at 8:45 am; Publication Date: 05/01/2012]